(27,764)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 407.

C. A. WEED & COMPANY, APPELLANT,

vs.

STEPHEN T. LOCKWOOD, AS UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1920.

1 In the United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant.

To the Honorable John R. Hazel, Judge of the District Court of the United States for the Western District of New York:

The plaintiff, for cause of action against the defendant, in this its amended bill of complaint, respectfully shows:

That at all the times hereinafter stated, plaintiff was and is a corporation organized and existing under the Laws of the State of New York, and having its principal place of business in the City of Buffalo, County of Erie and State of New York, and is a citizen and resident of said State.

That at all such times the defendant was and is the United States Attorney for the Western District of New York, residing and having his office at the City of Buffalo, County of Erie, in said State, and is a citizen and resident of said State.

That this is a suit of a civil nature and in equity, and the matter in controversy, exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars, and the value of the property rights involved, the amount of injury threatened, and the subject-matter of this action, exceed many times said sum or value

2 of Three Thousand Dollars; and it arises under the Constitution of the United States in this, to-wit: it necessarily involves and presents for decision, the question of the validity, under the Constitution of the United States, of an Act of Congress, approved August 10th, 1917, and entitled "An Act to Provide Further for the National Security and Defense, by Encouraging the Production, Conserving the Supply and Controlling the Distribution of Food Products and Fuel," as amended by an Act of Congress approved October 22nd, 1919, and therein designated as "The Food Control and the District of Columbia Rents Act."

That if said acts be enforced against this plaintiff, as they will be if enforcement thereof be not enjoined, such enforcement will necessarily and certainly entail upon plaintiff a loss and damage greatly in excess of the above amount, as hereinafter shown, and will entail numerous prosecutions thereunder against plaintiff, and the possible imposition upon plaintiff of penalties and expenses greatly in excess of the above amount, all as hereinafter more fully set forth.

That at all such times and for many years last past, plaintiff was,

and now is, engaged solely as a retail merchant in buying and selling, handling and dealing in wearing apparel, consisting of men's and young men's clothing, and having a retail clothing store and conducting the same in the city of *delphia and* Buffalo, N. Y.

That *each of* said *stores* is conducted and advertised under the name and title of C. A. Weed & Co., and said title has been so used in connection with plaintiff's said stores, and said store has
3 been operated by plaintiff continuously for nearly twenty years, and the same and said business of plaintiff is widely known, and enjoys a wide and favorable reputation, and has a large and numerous circle of customers, and a well-established trade, and has created and now owns, in addition to its tangible property and assets and its great investment therein, a good will of large value and constituting one of its most important and valuable assets.

That plaintiff now has on hand a large stock of wearing apparel which it has acquired and carried at great cost and by the investment of large sums of money in providing a suitable place of business and the necessary fixtures and appurtenances connected therewith.

That no combination of any kind now exists, or has at any time existed between or among the plaintiff and others, to fix or otherwise effect the selling price of any article of wearing apparel dealt in by any of them, and unrestricted competition has always existed and does now exist between them.

In and by Section 1 of the Act approved October 22nd, 1919, hereinabove referred to, Section 1 of the Act of August 10th, 1917, also hereinabove referred to, was amended so as to include, for the first time, among the articles designated in said Act, as necessaries, wearing apparel, which, in the Act as originally passed, had not been therein included, nor so designated. And said amended Act further provided that the President is authorized to make such regulations, and to issue such orders as are essential, effectively to carry out the provisions of said Act.

4 That in and by Section 2 of said Act approved October 22nd, 1919, Section 4 of said Act of August 10th, 1917, was amended so as to provide, among other things, that it should be unlawful for any person to make any unjust or unreasonable rate or charge in handling or dealing in, or with necessaries and that, any person violating any of the provisions of said section should be fined not exceeding Five Thousand Dollars, or be imprisoned for not more than two years.

That in and by Section 24 of said Act approved August 10th, 1917, of which Act the amendments made by the Act approved October 22nd, 1919, became a part, it was and is provided, among other things, that the provisions of said Act should cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.

That defendant, in his capacity as United States District Attorney for the Western District of New York, has been, and still is claiming, asserting and charging, that the plaintiff has been and now is

in violation of the said Act of Congress, and amendment, making unjust and unreasonable rates and charges in handling and dealing in and with wearing apparel, and charging excessive prices therefor, whereas, plaintiff has, at all times, earnestly and conscientiously endeavored to fix, make and exact only such rates, charges and prices as were just and reasonable and not excessive, and it has not, at any time, made or exacted any rate, charge or price which was either unjust or unreasonable or excessive.

That defendant, nevertheless, deeming it his duty so to
5 do, under the terms of said Act of Congress, as amended, and entertaining different views as to what constitutes just, reasonable and non-excessive rates, charges and prices, and applying different standards in making the determination presented to the Grand Jury of this Court, and said Grand Jury recently investigates alleged charges against this plaintiff, accusing it of having made unjust and unreasonable rates or charges in handling, dealing in and selling certain articles of wearing apparel, with the result that on or about April 10, 1920, under and pursuant to the alleged authority of said Act of Congress, as amended, the Grand Jury of this Court returned an indictment against plaintiff containing twenty distinct and separate counts, charging that number of distinct and separate alleged offenses, each count relating to the sale of a single suit of clothes or a single overcoat or other article of wearing apparel; and, the first count of said indictment, which is the same in language and form as each of the other counts, except as to the specific article alleged to have been sold, is in the words and figures set forth in Exhibit A hereto attached, and made part of this complaint.

That each of said counts alleges that plaintiff made an unjust and unreasonable charge in handling and dealing in and with the article therein described, and bases this charge and conclusion upon the further allegation that such unjust and unreasonable charge arose from the difference between the amount at which plaintiff purchased such article and the price at which it sold the same, each of said counts giving, or purporting to give the amount for which such
6 plaintiff procured such article and the amount or price at which it is alleged to have sold the same, and said defendant has threatened to, and unless prevented by injunctive order of this Honorable Court, will institute numerous further prosecutions against the plaintiff for alleged violations of said Act of Congress, will file informations and procure or attempt to procure further indictments against them and thereby and otherwise subject it to numerous and repeated prosecutions, for alleged violations of said Act.

That defendant insists, and will insist that, in determining whether any particular rate, charge or price, for wearing apparel, is just or unjust, reasonable or unreasonable, excessive or non-excessive, regard must be had solely to the actual original cost to plaintiff and other merchants of the particular and specific article in question, and that the present value thereof, at the time when the merchant fixes, makes or exacts the rate, charge or price thereof, cannot be taken into consideration and defendant, by insistence upon such standard,

will institute and press further prosecutions against plaintiff, seek and procure indictments against it, and do and commit the unauthorized and wrongful acts elsewhere herein more fully stated, unless prevented by order of this Honorable Court.

That for the past several years, and particularly during the latter part of said period, the actual costs to plaintiff and to other merchants, of the wearing apparel in which it and they deal, have been rapidly and at frequent intervals advanced, and as a consequence plaintiff and other merchants dealing in wearing apparel,
7 have in their stock, numerous articles of the same kind and quality, which, however, represent to him and them greatly differing costs; besides which, the actual fair market value of such articles of merchandise and each thereof has, since the same were placed in stock, rapidly and materially advanced, and such increments in value are the private property of the plaintiff or the merchant in each instance, as much so as the article of wearing apparel itself, and plaintiff and each merchant has the right assured to him by the Constitution of the United States, to the benefit and enjoyment thereof.

That the position assumed and insisted upon and which will be persisted in by defendant, does and will necessarily result in depriving the plaintiff and every such merchant in wearing apparel, of all benefit of such increments in value and will subject it and them to the risk of the heavy punishment and penalties imposed by the Act here involved, whenever they seek to avail themselves of such increments, or to take the benefit of the same, as they have a constitutional right to do, all of which is in conflict with and prohibited by Article V of the Amendments to the Constitution of the United States.

That, if specific articles of wearing apparel should be priced with sole reference to the actual original cost of each of said articles, instead of in accordance with the present fair market value thereof, or in accordance with the average of the actual original cost to the merchant of such and like articles in his stock, the result would be, that, in the stock of plaintiff and of every other merchant in wearing apparel, great numbers of articles exactly alike, both in kind
8 and quality, and differing only in respect to the date of their acquisition by the merchant would bear wholly different and widely divergent prices, both in the case of each merchant and also in the case of every merchant, when compared with all other merchants, thus producing a situation rendering it wholly and absolutely impossible properly, or at all, to conduct or continue in the business of merchandising in wearing apparel, and producing such a state of confusion as to totally destroy the business; and further, that the result thereof to the public who deal and have been accustomed to deal with plaintiff and other merchants in wearing apparel would be wholly intolerable; that this likewise, is and will be in conflict with, and prohibited by the Fifth Article of the Amendments to the Constitution of the United States.

That notwithstanding the provisions of the first section of said Act quoted above, that "The President is authorized to make such

regulations and to issue such orders as are essential effectively to carry out the provisions of this Act," the fact is that, with respect to wearing apparel, no such regulations have been made and no such order or orders issued, whether by or for the President, or otherwise, or at all; and, in respect to the sale of wearing apparel, no prices, rates or charges whatsoever have been fixed, either by the President or on his behalf or by any official, body or agency, or otherwise, or at all, for the guidance of persons handling or dealing in the same, nor have any steps been taken so to do.

That defendant claims and insists that under the terms of
9 said Act, each sale at retail of any article of wearing apparel constitutes or may constitute a violation of said Act.

That the sole business of plaintiff consists in the making of such sales, and a large number of such sales are made every day.

That said Act does not provide, nor has there otherwise been in any way established a standard by which to determine whether, in any particular instance, the rate or charge made is, in the sense of said Act, just or unjust, reasonable or unreasonable, or whether the price exacted is, in the sense of said Act, excessive or otherwise. That the President of the United States, however, has issued regulations and orders applicable to certain articles and commodities referred to in said Act, other than wearing apparel, whereby there were fixed and specified prices or amounts that persons dealing therein were authorized to charge and receive therefor, so that, as to the articles and commodities upon which the President has so established a definite price, plaintiff and other persons dealing therein, were enabled to determine whether they were obeying or disobeying said law, which is impossible under the provisions thereof relating to wearing apparel, in view of the failure of the President to promulgate regulations and orders or to fix prices relating thereto.

That, as a result, plaintiff and other merchants are, and each of them is, subjected to the possibility of prosecution upon each and every of the innumerable transactions in which it and they daily necessarily take part.

10 That since the finding of the above indictment against plaintiff, the defendant has caused the treasurer of plaintiff to appear before, and to be examined by said Grand Jury, as to sales other than those set forth in said indictment.

That the defendant, unless prevented by the injunctive order of this Court will urge, and, if possible, obtain further indictments upon such charges against plaintiff and others and their respective officers and agents, upon what he asserts to be numerous and almost innumerable violations of said Act, and threatens to, and unless so prevented, will urge such prosecutions to final conclusion and institute and carry through a great multiplicity of like prosecutions, all to the great and irreparable damage of plaintiff, as hereinafter set forth.

That plaintiff is not, in any respect, guilty of any of the charges or accusations made in said indictment, and has not charged, received or exacted excessive prices for any of the goods sold by it, at any time, and plaintiff has pleaded not guilty to said indictment,

reserving the right, however, to withdraw said plea, and to make such motion, or take such other proceedings in the premises as it might be advised;

That plaintiff has not demurred to said indictment for the reason, among others, that the presentation and argument in Court, of a demurrer will be attended with wide publicity through the press and other mediums, and will, of itself, result in loss and irreparable injury to plaintiff and its creditors, and in case a demurrer should be overruled, such decision could not be reviewed on appeal, until after the trial, and a judgment thereon, whereas the granting of an interlocutory injunction order in this action could be promptly reviewed by the United States Circuit Court of Appeals under Sec. 129 of the Judicial Code, permitting such an immediate appeal and its prompt determination.

11 That the defendant threatens and has stated, that he intends and proposes to force and bring on the trial of plaintiff, under said indictment at once, and during the present term of this Court, now in session at Buffalo, N. Y., and which plaintiff is informed and verily believes is to continue only to, and during the month of April, and possibly the first week of May, 1920.

That further proceedings upon said indictment as to this plaintiff have now been adjourned until Tuesday morning, April 27, 1920, at ten o'clock, when, unless a temporary restraining order is issued, plaintiff will be obliged to determine definitely to let his plea of "not guilty" stand, or to withdraw the same and to interpose a demurrer to the indictment.

That the trial of said indictment will necessarily involve general publicity through the press and other mediums, not only in Buffalo, but in the other localities in which plaintiff has customers, and as the public is peculiarly sensitive to a charge or even suspicion of so-called profiteering, the publicity attending such a trial will cause plaintiff great and irreparable injury, and may and is likely to cause the ruin of its entire business and the financial ruin of plaintiff and its stockholders, as well as great and irreparable loss to its creditors; and plaintiff further alleges, on information and belief, and is advised by its Counsel, and verily believes that the said indictment found against it by the Grand Jury of this Court, as aforesaid, does not, in any event, state or set forth facts constituting a crime,

12 under said Act above referred to, or otherwise, by reason of various vital and material allegations, among others, the absence of any statement as to the market value of the articles alleged to have been sold at an unjust or unreasonable rate, the allegations on this point being merely as to the original cost of such articles; the absence of any statement that the President has made or issued any regulations or orders, regarding the sale of wearing apparel, or otherwise essential effectively to carry out the provisions of said Act; the absence of any statement to the effect that the rates or charges made by plaintiff in handling or dealing in or with such wearing apparel, resulting from its entire business, at its Buffalo store, or elsewhere, were unjust or unreasonable, or yielded an unjust or unreasonable profit to it, as well as the omission of other material allegations,

which under any circumstances could or might constitute a crime, under said Act.

And plaintiff further alleges, that in delivering its charge to the Grand Jury of the present term of this Court, this Court stated to and charged said Grand Jury, in substance, that they would be warranted in finding indictments under said Act, in case they found from evidence presented to them that persons had sold a single article of the kind described in said Act at a price above the cost thereof, which they deemed an unjust or unreasonable rate or charge in handling or dealing in or with the sale; and the indictment against this plaintiff hereinabove described is clearly based on such interpretation of the Law by the Court as was embodied in its said charge; which charge will be presented to this Court in support of and as part of this bill of complaint, and of plaintiff's motion
13 for an interlocutory injunction order.

That plaintiff is advised by its counsel, and verily believes, that said charge deprived the Grand Jury of the right to consider, and it did not take into consideration, the market or replacement value of the articles mentioned in the indictment, and that such interpretation of the said Act was erroneous for the reasons, among others, above stated, and there is no procedure except a suit in equity under which the charge of the Grand Jury can, at all, be reviewed on appeal, or by the higher Courts, nor the alleged erroneous interpretation of this statute, reviewed, until after final judgment upon a trial, which procedure, for the reasons above stated, would work irreparable injury to plaintiff.

That various banks holding the negotiable paper of plaintiff for loans and on discount, to the extent of many thousands of dollars, would be likely to become apprehensive and to crowd plaintiff for payment and to refuse the continued carrying and renewal of plaintiff's indebtedness to them, should the publicity attending a trial of the said indictment arise, and such course would be likely to ruin plaintiff's business.

That the retail clothing business in general, including that of plaintiff, has been exceptionally dull during the past few weeks, owing in part to the profiteering agitation, and also to various other causes, such as the recent railroad strike and the movement for the general wearing of over-alls, or old discarded clothing, which has been spreading rapidly throughout the land within the past few days; and any further elements of disturbance of the clothing industry and business is certain to prove disastrous to plaintiff
14 and to other persons and corporations engaged therein, and to be irremediable.

That all such acts and threatened further acts of defendant are and must be based upon the assertion and contention that said Act of Congress, as amended, is, so far as it applies to plaintiff, valid and effective.

And plaintiff further alleges, upon information and belief, and is advised by his counsel that said Act of Congress, as amended, now is and at all times has been, wholly void, invalid, ineffective and unconstitutional for the following reasons, among others:.

(*a*) Said amending Act of October 22nd, 1919, and particularly Section 2 thereof, whereby Section 4 of the original Act was amended, does not define the offense thereby denounced as a crime, and for which severe punishment and penalties are provided, but leaves the definition thereof to the judgment, discretion and conscience of judges and trial juries, and, therefore, said statute is an ex post facto law, and is in conflict with Article I, Section 9, Subdivision 3, of the Constitution of the United States.

(*b*) By reason of the facts last aforesaid, said mending Act is likewise in conflict with Article VI of the Amendments to said Constitution, in that, no one accused of a violation of said Act, especially in so far as it relates to wearing apparel, or the rates, charges or prices made or exacted in handling, dealing in or with, or selling the same, is or can thereby be informed of the nature or cause of the accusation against him, and no one at the time of the Act which forms the basis of the charge, can by any possibility, determine whether he is, or is not violating said statute.

15 (*c*) Said amending Act of October 22nd, 1919, and particularly Section 2 thereof amending Section 4 of the original act, is in conflict with Article V of the Amendments to the Constitution of the United States, in that, plaintiff and others similarly situated are thereby deprived of their liberty and of their property without due or any process of law, and their private property is taken without just or any compensation; and they are subjected to fine and imprisonment for an offense or offenses concerning which they were not and could not be previously informed, and the commission of which they could not avoid, because they had not been and could not be advised as to what act or acts could or did constitute such offense; and in that they are, and each of them is, and necessarily will be deprived of their and its liberty and property without due or any process of law, in that thereby they are and each of them is deprived of the liberty and private property right of making and carrying out such contracts as they or any of them may desire, concerning the handling or selling of or the dealing in wearing apparel, and particularly concerning the rate or charges made and the prices exacted therefor.

(*d*) The business in which plaintiff is engaged, of buying, selling and handling or dealing in wearing apparel, is not one of such a public nature as to permit the regulation by public authority of the practices, rates, charges or prices employed, made or imposed in connection therewith, and the Act of Congress here involved constitutes an unwarrantable interference with, and deprivation of the right and liberty of private contract and so deprives
16 plaintiff of its liberty and of its property without due or any process of law, in violation of said Fifth Amendment to said Constitution.

(*e*) As an attempted regulation of rates, charges, prices and practices, said Act of Congress is, as to this plaintiff, invalid and

unconstitutional, because such power of regulation is a legislative power and may be exercised only by the legislative branch of the Government; but by said Act of Congress, the legislative department has not itself established or defined the basis of such regulation of rates, charges, prices or practices, but has attempted thereby to delegate to a wholly different department or departments, to-wit: to the judicial or to the executive, the right and the power in each particular instance, and by different standards, so to regulate, thereby violating the provisions of the Constitution of the United States and the amendments thereof, whereby the powers of Government are assigned to the three great departments, to-wit: Legislative, Executive, and Judicial, and each is prohibited from exerting or attempting to exert a power belonging to either of the others.

(*f*) The classification made in said act, and particularly in Section 4 of said Act of August 10th, 1917, as amended by Section 2 of said Act of October 22nd, 1919, whereby those engaged in certain occupations, pursuits and businesses, are wholly exempt from the operation thereof, is unjust, unreasonable and arbitrary, and deprives plaintiff of its property and rights without due process of law, in violation of said Fifth Amendment.

17 (*g*) Said amending act of October 22nd, 1919, and especially Section 2 thereof amending Section 4 of the original act, is in violation of Article VIII of the Amendments to the Constitution of the United States, in that, thereby, excessive fines are to be and will be imposed and cruel and unusual punishments inflicted in this, to-wit, that one who acts without intent to do wrong and with the honest intention and in the honest effort to do right and to comply with the requirements of said act, may be and in many cases will be, subjected to the imposition of excessive fines in an amount as great as $5,000 and to a punishment which, under such circumstances, would clearly be cruel and unusual, consisting of imprisonment for as much as two years or both such fine and imprisonment, and said penal clauses are further so unusual, excessive, cruel and drastic as to render it impossible for plaintiff to engage freely or properly in the business to which their property and efforts hitherto have been and are now devoted. If said act be valid and enforcible, safety can be had only by completely withdrawing from and no longer engaging in said business. No merchant can fix or exact any charge, or price, no matter how reasonable and non-excessive he may conscientiously believe it to be, without incurring the risk, that if his judgment differs from that of someone else, he will be subjected to the heavy penalties of said Act. As a result, the business of plaintiff and others similarly situated cannot be conducted at all and must be abandoned, or to assure safety from attack and the possible imposition of the heavy penalties, the merchant must fix and maintain his prices and charges at a level so far below what, in his judgment, they ought reasona-
18 bly and conscientiously to be, as to make it certain that no judge, jury or prosecuting attorney could thereafter, by any possibility, conclude, however, unjustly, that the same were either

unjust or unreasonable or excessive. Such a situation is intolerable and renders said statute, as amended, wholly invalid, because violative of the provisions of the Fifth and Eighth Amendments to the Constitution of the United States.

(*h*) Said Act was enacted by Congress in the attempted exercise of a power not possessed by or delegated to it, but by Article X of the Amendments to the Constitution of the United States, expressly reserved to the states respectively or to the people.

(*i*) Said Act was enacted by Congress in the attempted exercise of the war powers conferred by Section 8 of Article I of the Constitution of the United States, whereas, on October 22nd, 1919, when the amending Act here involved was passed, there existed no situation calling into play the war powers of Congress, nor authorizing the exercise of such powers in respect to the matter which was the subject of said legislation, and as a consequence, said amending act was beyond the power of Congress and in conflict with Article X of the Amendments to said Constitution that on October 22nd, 1919, when said amending act was passed, and prior thereto, the war between the United States and Germany had actually terminated, the Army and Navy had been demobilized, and there existed no situation calling into play the war powers of Congress and particularly none authorizing Congress to deal with wearing
19 apparel and with those dealing in the same.

And plaintiff further alleges, upon information and belief, and is advised by its counsel, and verily believes, that the said Act under which said indictment purports to be found is invalid, unconstitutional, null and void, upon the following further grounds, and for the following further reasons:

That it is vague, indefinite and uncertain and it is impossible to determine from its language or provisions what Congress intended to prohibit and punish;

That it appears upon the face of said Act that in no event did Congress thereby intend to define or intend to provide for the punishment of any offense thereunder until the president of the United States should by rules and orders definitely describe and define the elements and restrictions necessary to enable the citizens and people generally to determine whether a given sale or dealing in the commodity referred in said Act as necessary would violate said Act as defined and limited by such rules and orders of the President to be promulgated thereunder, and no such rules or orders having been made by the President, no violation of said Act is or has thus far been possible.

That an interpretation of said Act of Congress to the effect that an unjust or unreasonable rate or charge in dealing with necessaries may, or can be based on the mere difference between the cost of such necessaries and the selling price thereof, will render such Act unconstitutional for the reasons and upon the grounds above stated.

20 That an interpretation of said Act of Congress to the effect that an unjust and unreasonable rate or charge in dealing

with necessaries may, or can be based on the difference between the cost or the market value of necessaries and the selling price thereof, as shown by the sale of one or more articles of such necessaries, or other than upon the profits of an entire business or single department thereof, dealing in a given line of necessaries, will render such Act unconstitutional, for the reasons and upon the grounds above stated.

That said amending Act of October 22nd, 1919, and particularly Section 2 thereof amending Section 4 of the original Act, being in conflict with, and prohibited by the various constitutional provisions mentioned above and being for the reasons herein specified, invalid, and the standards which, under said Act, defendant does and will apply being likewise as hereinbefore stated, wholly improper, unwarranted, unauthorized and unconstitutional, the acts of defendant, under color of his office of such United States District Attorney, done and threatened to be done, do, and will deprive plaintiff, and others similarly situated, of property without due or any process of law, in that the continued and repeated harassment to which plaintiff is, and will be thereby subjected, the multiplicity of prosecutions threatened to be and which will be brought against it, the great number of informations and indictments returned and threatened to be and which will be returned against it, have resulted, and necessarily will result, in great monetary loss to it, in the sub-
21 stantial diminution, if not total destruction of the valuable property and the property right known as Good Will, now owned, possessed and enjoyed by it, and in the great injury to, if not the utter destruction of the established businesses which it now owns, possesses and enjoys; all of which is and will be in conflict with and prohibited by Article V of the Amendments to the Constitution of the United States.

That by reason of the total lack of any fixed standard by which to determine whether any particular rate or charge or price is reasonable or unreasonable, excessive or otherwise, plaintiff cannot, nor can other merchants similarly situated, continue to engage in the business and trade to which their efforts and their capital hitherto have been and now are devoted, if said Act as amended be valid and enforceable; that the business in which they are engaged necessarily involves the fixing, making and exacting of rates, charges and prices, and cannot be conducted without so doing; but that no merchant, no matter how careful and conscientious he may be, or how earnest and honest his effort to fix rates, charges and prices which shall be just, reasonable and not excessive, can know or have any reason to feel assured that some one else viewing the matter at a later date will reach the same conclusion as he has relative to the reasonableness or propriety of any particular rate, charge or practice; and, as a result, the mere existence of such a statute as that here under consideration, and, particularly, the efforts and threats of defendant to enforce the same, necessarily inflict great and irreparable injury and damage upon and immensely restrict and reduce the value of the es-
22 tablished business of said plaintiff, and of all others similarly situated.

That defendant herein, by virtue and under color of his alleged authority as United States Attorney, and assuming to act under the statute here involved, has insisted and continues to insist upon the right, through his agents and representatives, to enter the various places of business of the plaintiff, to investigate its books and records, and otherwise to interfere with, and impede the conduct of the business of plaintiff in an orderly and proper manner, and thereby greatly to annoy and harass plaintiff and its officials and employees and to inflict upon plaintiff great and irreparable injury, all of which acts defendant threatens to and will continue to do, unless prevented by order of this Court.

That further proceedings under the said indictment against this plaintiff or the procuring and return of further indictments against it for violation of said Act, and whatever the ultimate result of trials thereunder may be, will inevitably inflict upon plaintiff great, irreparable and immeasureable damage and injury, subject it to public odium, divert from it and to others in exactly the same situation, except that they have not yet been publicly attacked, business which plaintiff otherwise would enjoy, and thereby greatly diminish, if not utterly destroy its established business and good will which has been the result of years of honest and earnest effort, and created by great expenditure of capital and energy, and thereby great, irreparable and immeasureable damage and loss will be inflicted.

23 That each sale made by a merchant constitutes, under the provisions of said Act, as interpreted by defendant, a separate offense, if the rate or charge made, be afterwards determined to be unjust or unreasonable or the price fixed or exacted excessive; that in the business of plaintiff, there are innumerable such transactions, and defendant threatens to, and unless prevented by order of this court, will make many, if not every, of such transactions the basis of separate charges against plaintiff, and others similarly situated, and thereby there will inevitably ensue an enormous multiplicity of criminal proceedings, as a result of which plaintiff must and inevitably will be subjected to great, irreparable and immeasureable loss and damage, the grand juries and the Courts flooded with repeated, prolonged and expensive inquisitions and litigations and the public treasury subjected to great loss, all of which, will be wholly unnecessary and improper, if, as plaintiff contends, the Act here involved be invalid and such invalidity is promptly determined in this suit in equity.

That by reason of the facts hereinbefore set forth, plaintiff has no plain, speedy or adequate, or any remedy whatsoever at law, and is wholly without remedy, except in equity, here sought; and unless this bill be entertained and the relief here sought, granted, plaintiff will be, and inevitably must be subjected to great, irreparable and immeasureable loss and damage, for which it would and could have no remedy whatever and plaintiff's acquittal by a jury, after trial, would necessarily come after such irreparable loss and injury to plaintiff and its creditors had been inflicted upon and suffered by it

24 and its creditors, and it is extremely doubtful whether plaintiff and its business could survive the strain of such procedure.

That the questions involved herein and presented hereby are of common and general interest, not only to the plaintiff herein, but also to all other merchants and dealers in wearing apparel similarly situated.

Wherefore, plaintiff prays a decree as follows:

1. That a subpœna issue out of this honorable Court, directed to the defendant, requiring and commanding him to appear in this Court and in this cause, upon a day certain and answer the several allegations in this bill of complaint contained, answer under oath being hereby expressly waived, and that defendant may answer this bill of complaint without oath, and each and every statement therein contained.

2. That the defendant be permanently restrained and enjoined by this Court from taking any further proceedings under, upon and subsequent to the indictment against plaintiff, pending in this Court, and described in the foregoing bill of complaint, or from bringing plaintiff to trial thereon, or from further prosecuting said indictment and said criminal action and proceeding, pending thereon, in this Court, by the United States of America, against the plaintiff.

3. That the defendant be restrained and enjoined from instituting any further hearings or proceedings, looking to any further indictment under said Lever Act, against the plaintiff, before the present or any future Grand Jury of this Court.

25 4. That there be issued herein a preliminary or interlocutory injunction to remain in effect until the final hearing of this cause, prohibiting the defendant, his agents and representatives and each of them, from the above acts and from enforcing or attempting to enforce against the plaintiff herein or against its officers, agents or representatives, said Act approved August 10th, 1917, as amended by said Act approved October 22nd, 1919, from prosecuting or attempting to prosecute, or instituting or attempting to institute any prosecution against them, or either of them, under said Act, and from interfering with it, or with its business, or taking or attempting to take any steps whatsoever in respect to it or its business, under or by virtue of any right or authority claimed to exist by reason of said Act as amended, or any part thereof; and that upon final hearing said injunction may be made permanent.

5. That the Court declare and decree said Act of August 10th, 1917, as amended by said Act of October 22nd, 1919, and particularly section 1 of said Act of August 10th, 1917, as amended by section 1 of said Act of October 22nd, 1919, and section 4 of said Act of August 10th, 1917, as amended by section 2 of said Act of October 22nd, 1919, wholly invalid and unconstitutional and of no effect as against this plaintiff.

6. For such other, further and different relief as to the Court may seem meet and just in the premises and for costs in this behalf expended.

EDWARD L. JELLINEK,
SIMON FLEISCHMANN,
Solicitors for Plaintiff, 930 Prudential Bldg., Buffalo, N. Y.

26 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Robert S. Weed, being duly sworn, says that he resides in the City of Buffalo, State of New York, and is an officer, to wit, the President of the plaintiff, C. A. Weed and Company, Inc., in the above entitled action, that he has read the foregoing amended bill of complaint, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters, he believes it to be true.

ROBERT S. WEED.

Sworn to before me this 26th day of April, 1920.
BESSIE McCOLLUM,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

27 EXHIBIT "A."

WESTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the District aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said District, do, upon their oaths, present that C. A. Weed and Company, was, at all times and continuously between the 22nd day of October, 1919, and the date of the filing of this indictment, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of Buffalo, County of Erie, in the Western District of New York, and that said C. A. Weed and Company, with force and arms, etc., to wit, at Buffalo, in the County of Erie, in the said Western District of New York, and within the jurisdiction of this Court, heretofore, to wit, on the 1st day of November, 1919, while doing business as a retail dealer in men's wearing apparel and during the existence of a state of war involving the United States, and while the United States was at war with Imperial Germany, and Austria-Hungary, did then and there, knowingly, wrongfully, unlawfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in and with a certain necessary wearing apparel, to wit: One Men's Suit, described by lot number 321-35, in that it, the said C. A. Weed

and Company, did then and there sell the said men's suit to one S. M. Flickinger, for the sum and charge of $65.00, which said men's suit was procured by the said C. A. Weed and Company on October 9th, 1919 for the sum of $35.81, which charge of $65.00 so made by said C. A. Weed and Company, in so dealing wherein was then and there unreasonable and unjuct, contrary to the form of the statute of the United States of America, in such case made and provided and against the peace and dignity of the said United States of America.

28 [Endorsed:] U. S. District Court for the Western District of New York. C. A. Weed and Company, against Stephen T. Lockwood, as United States Attorney for the Western District of New York. Copy. Amended Complaint, Affidavit and Notice. Edward L. Jellinek and Simon Fleischmann, Solicitors for Plaintiff, Office and P. O. Address, 930 Prudential Bldg., Buffalo, N. Y.

29 United States District Court, Western District of New York.

In Equity. No. 285.

C. A. WEED and COMPANY

vs.

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York.

Motion to Dismiss Bill of Complaint in Equity.

SIRS:

Please take notice that upon the bill of complaint herein, filed in the office of the Clerk of this Court on the 20th day of April, 1920, I shall move this Court on June 11th, 1920, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order dismissing the said bill of complaint for want of equity and for such other and further relief in the premises as may be just upon the following grounds, to wit—

1. That this suit is against the United States and that said United States cannot be used for the reason that it is a sovereignty and that no law exists which authorizes the suit against it for the relief sought in the complaint.

2. That the subject of the suit is not within the jurisdiction of a court of equity.

3. That the plaintiff has adequate remedy at law for the relief sought in this complaint.

4. That there is another suit pending between the parties for the same cause of action.

30 5. That said bill of complaint is insufficient in law upon the face thereof and does not state facts sufficient to constitute a cause of action in equity.

Dated at Buffalo, N. Y., June 1st, 1920.

STEPHEN T. LOCKWOOD,
United States Attorney in and for the Western District of New York, Solicitor of the Defendant.

To Simon Fleischmann & Edward L. Jellinek, Solicitors for Plaintiff.

31 [Endorsed:] United States District Court, Western District of New York. C. A. Weed & Company, Plaintiff, vs. Stephen T. Lockwood, as United States Attorney for the Western District of New York, Defendant. Motion to dismiss bill of complaint in equity. Copy. Stephen T. Lockwood, Attorney for defendant-appellee.

32 *Decree Dismissing Complaint.*

United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant.

This cause came on to be heard at this Term and was argued by counsel and submitted to the Court upon the application of said defendant and upon the motion of said defendant, to dismiss the bill of complaint and this suit, upon the grounds set forth in defendant's notice of motion; and the Court being now fully advised in the premises and upon consideration thereof, having announced his decision and caused a minute entry thereof to be made to the effect following;

It is therefore ordered, adjudged and decreed that the motion of said defendant to dismiss said bill of complaint be sustained and that said bill of complaint and this cause be, and the same hereby are dismissed, and that the defendant recover from plaintiff its costs herein expended.

June 11, 1920.

JOHN R. HAZEL,
United States District Judge.

33 [Endorsed:] United States District Court, Western District of New York. C. A. Weed & Company, Plaintiff, vs. Stephen T. Lockwood, as United States Attorney for the Western District of New York. Final Decree Dismissing Bill. Copy. Stephen T. Lockwood, Attorney and defendant-appellee.

34 *Petition for Appeal.*

In the United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant-Appellee.

To the Honorable John R. Hazel, District Judge:

The above named plaintiff C. A. Weed and Company, feeling aggrieved by the final decree rendered and entered in the above entitled cause on the 11th day of June, 1920, dismissing the bill of complaint herein, and in refusing to issue a permanent and an interlocutory order of injunction herein, does hereby appeal from said final decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith; and it prays that its appeal be allowed and that a citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said order or decree was based, duly authenticated, be sent to the United States Supreme Court, under the rules of said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it, be made.

EDWARD L. JELLINEK,
SIMON FLEISCHMANN,
MARTIN CLARK,
Solicitors for Plaintiff-Appellant.

Buffalo, June 11, 1920.

35 [Endorsed:] United States District Court Western District of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York. Copy. Petition for Appeal. Edward L. Jellinek and Simon Fleischmann, Martin Clark, Attorneys for plaintiff-appellant. Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

36 In the United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant-Appellee.

Assignment of Errors.

The above named plaintiff, files the following assignment of errors upon which it will rely in its prosecution of the appeal in the above entitled cause from the final decree made by this Court on the 11th day of June, 1920, which dismissed the bill of complaint and denied plaintiff's motion for a permanent and an interlocutory injunction order:

I.

The Court erred, as matter of law, in dismissing complainant's bill of complaint herein and in refusing complainant's prayer for a permanent and an interlocutory injunction order, restraining the defendant from further prosecuting a criminal action against the complainant, or instituting further proceedings against complainant, for an alleged violation of Sections 1 and 4 of the Act of Congress known as the Lever Act, which is an Act entitled "An act to provide further for the National security and defense, by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10th, 1919, as amended by an Act of Congress passed and approved October 22nd,
37 1919, known as "The Food Control and District of Columbia Rents Act."

II.

The Court erred, as matter of law, in denying said plaintiff's prayer for injunctive relief and in its refusal to hold unconstitutional and invalid, the said Sections 1 and 4 of said Lever Act, in general and in particular as regards the handling of and dealing in wearing apparel, in said sections specified, upon the grounds that said Act, as so amended, violates the following provisions and amendments of the Constitution of the United States:

(a) Article I, Section 9, Sub-division 3, in that said provisions of said Act constitute an ex post facto law.

(b) Article VI, of the Amendments to the Constitution, in that said provisions of said Act do not inform the complainant, or anyone else accused thereunder of the nature or cause of the accusation;

and said provisions are vague, indefinite and uncertain, and do not define with sufficient accuracy or definiteness, the crime or offense for which they provide punishment, so that a person or corporation can determine whether he or it is violating said provisions, nor define any determinable crime whatsoever, and therefore do not, and did not inform this complainant of the nature or cause of the accusation against it.

(c) Article V, of the Amendments to the Constitution, in that said provisions of said Act deprive complainant of liberty and property without due process of law, and take its property for public use without just compensation, and is unjustly, unreasonably and unlawfully discriminatory and arbitary in its attempted classification of certain persons and pursuits whom they exempt from the operation thereof.

38 (d) The provisions of the Constitution dividing and assigning the three departments of government into the legislative, executive, and judicial, in that it delegates to the judicial and executive powers of the Government powers conferred by the Constitution solely on the legislative branch.

(e) Article VIII of the Amendments to the Constitution, in that said provisions of said Act impose excessive fines and inflict cruel and unusual punishments on those found guilty thereunder.

(f) Article X of the Amendments to the Constitution, in that said provisions of said Act assume to confer powers on the United States reserved to the states or to the people thereof, and not prohibited by said Constitution to the States.

(g) Article I, Section 8, of the Constitution, in that said provisions of said Act assume to confer or to continue the war powers of Congress in respect to the matters which are the subject of said legislation and powers over which, were never conferred by the Constitution upon Congress even as war measures, and in that in any event the condition of war which might have authorized the exercise of such powers by Congress had ceased and terminated long prior to the enactment of said provisions of said Act.

III.

The Court erred in its refusal to hold inoperative the said Act as amended, in any event, by reason of the failure of the President of the United States to issue regulations or orders thereunder, required by said Act to make it operative and to carry it into effect, as well as by reason of the President's failure to create the conditions provided by Section 5 of said Act to make it operative
39 against complainant and others similarly situated.

IV.

The Court erred in its refusal to hold that the defendant, the United States Attorney, exceeded and transcended and threatened to

continue to exceed and transcend his authority in prosecuting complainant under said indictment, in view of the fact and the law that said indictment referred to in the bill of complaint is invalid, null and void, and does not state facts constituting a crime under the said provisions of said Act, above referred to, or otherwise, whether such Act be constitutional or unconstitutional.

V.

The Court erred in not holding that the defendant threatens to proceed against complainant in a manner injurious to complainant's property rights, and not authorized by the Constitution of the United States or said Act, and has transcended and threatens to transcend his authority, and in refusing to enjoin him from committing further acts of the same nature.

VI.

The Court erred in refusing to hold that the denial of complainant's prayer and motion for a permanent and an interlocutory injunction order and decree will produce great and irreparable injury to complainant, and that it has no adequate remedy at law for its protection and for redress.

VII.

The Court below erred in holding that the said Sections 1 and 4 of said Lever Act are constitutional and within general or
40 war powers vested in the Congress of the United States.

EDWARD L. JELLINEK,
SIMON FLEISCHMANN,
MARTIN CLARK,
Solicitors for Plaintiff-Appellant.

Buffalo, June 11, 1920.

41 [Endorsed:] United States District Court Western District of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York, Defendant. Copy. Assignment of Errors. Edward L. Jellinek and Simon Fleischmann, Martin Clark, Attorneys for plaintiff-appellant. Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

42 *Waiver of Appeal Bond.*

In the United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant.

The plaintiff having this day perfected an appeal to the United States Supreme Court from a final decree of this Court made June 11, 1920, dismissing the bill of complaint and this suit;

It is stipulated that the giving of the usual appeal bond by plaintiff in connection with said appeal, be and same is hereby waived and that said appeal be deemed perfected in all respects as if said appeal bond had been given, approved and filed.

Dated Buffalo, N. Y., June 11, 1920.

SIMON FLEISCHMANN AND
MARTIN CLARK,
EDWARD L. JELLINEK,
Solicitors for Plaintiff.
STEPHEN T. LOCKWOOD,
Attorney for Defendant.

43 [Endorsed:] United States District Court for the Western District of New York. C. A. Weed and Company, Plaintiff, against Stephen T. Lockwood, as U. S. Attorney for the Western District of New York. Copy. Waiver of Appeal Bond. Simon Fleischmann and Edward L. Jellinek, Attorneys for Martin Clark, Plaintiff, Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

44 *Order Allowing Appeal.*

At a Stated Term of the United States District Court, Held at the Federal Building in the City of Buffalo, in and for the Western District of New York, on the 11th Day of June, 1920.

Present: Hon. John R. Hazel, District Judge.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant-Appellee.

Now comes the above-named plaintiff herein, C. A. Weed and Company, by its solicitors, and presents to the Court its petition for appeal to the Supreme Court of the United States from a final decree made and entered herein on the 11th day of June, 1920, dismissing the bill of complaint herein, in the above entitled suit, and denying complainant's prayer for injunctive relief, and also at the same time files its assignment of errors as required by law and the rules of the Supreme Court of the United States.

And it is hereby Ordered that the said appeal may be and the same is hereby allowed, and that a certified transcript of the record and all proceedings be forthwith transmitted to the said Supreme Court of the United States;

And it is further Ordered that a citation be issued admonishing the defendant to be and appear in the United States Supreme Court within thirty days from this date;

45 And it is further Ordered that the bond on appeal having been duly waived by stipulation of the parties hereto, be and hereby is dispensed with.

JOHN R. HAZEL,
United States District Judge.

46 [Endorsed:] United States District Court, Western Distriut of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York, Defendant. Copy. Order Allowing Appeal to United States Supreme Court. Edward L. Jellinek and Simon Fleischmann, Attorneys for Martin Clark, Plaintiff-Appellant, Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

47 *Citation on Appeal.*

In the United States District Court for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant-Respondent.

UNITED STATES OF AMERICA, *ss:*

To Stephen T. Lockwood, as United States Attorney for the Western District of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 10th day of July, 1920, pursuant to an order allowing an appeal, filed and entered in the office of the Clerk of the District Court of the United States, for the Western District of New York, from a final decree signed, filed and entered on the 11th day of June, 1920, dismissing the bill of complaint herein and refusing injunctive relief to the said plaintiff-appellant, in that certain suit being in Equity No. —, wherein you are defendant and appellee and the above named C. A. Weed and Company, is plaintiff and appellant, to show cause, if any there be why the said decree, as in the order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable John R. Hazel, United States District Judge for the Western District of New York, this 11th day of June, 1920, and of the independence of the United States, the 144th.

[Seal United States District Court, Western District, New York.]

JOHN R. HAZEL,
U. S. District Judge for Western District of New York.

48 [Endorsed:] United States District Court, Western District of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York, Defendant. Copy. Citation on Appeal to United States Supreme Court. Edward L. Jellinek, and Simon Fleischmann, Attorneys for Martin Clark, plaintiff-appellant. Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

49 *Præcipe for Record on Appeal.*

In the District Court of the United States for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant.

To the Clerk of the District Court of the United States for the Western District of New York:

You will please forthwith prepare a transcript of the record in the above entitled cause, for appeal from the final decree made and entered in the above entitled cause on the 11th day of June, 1920, which said record shall consist of the following:

Amended bill of complaint.
Notice of motion for dismissal of bill of complaint and of above suit.
Final decree dismissing bill of complaint and suit.
Stipulation waiving bond on appeal.
Petition for order allowing appeal.
Assignment of errors.
Order allowing appeal.
Citation on appeal.
Præcipe for record on appeal.
Opinion of Judge Hazel.
Stipulation as to record.
Clerk's certificate on record.
Buffalo, N. Y., June 11, 1920.

SIMON FLEISCHMANN,
MARTIN CLARK,
EDWARD L. JELLINEK,
Solicitors for Plaintiff-Appellant.

50 [Endorsed:] United States District Court, Western District of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York, Defendant. Copy. Præcipe for Record on Appeal to the United States Supreme Court. Edward L. Jellinek and Simon Fleischmann, Attorneys for Martin Clark, plaintiff-appellant. Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

51 *Opinion of Judge Hazel.*

District Court of the United States, Western District of New York.

C. A. WEED AND COMPANY

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York.

SULTZBACH CLOTHING COMPANY, INCORPORATED,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York.

ANTWERP DIAMOND COMPANY, INCORPORATED,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York.

UNITED STATES

against

RELIABLE CREDIT CLOTHING COMPANY, INCORPORATED.

Stephen T. Lockwood, United States Attorney for the Western District of New York; Carl Sherman, Assistant United States Attorney, for the Government.

Simon Fleischmann, Esq., (Irving L. Fisk, Louis E. Desbecker and Edward L. Jellinek on the Briefs), for C. A. Weed and Company.

Emil Rubsenstein, Esq., (James O. Moore of counsel), for Reliable Credit Clothing Company, Incorporated.

Motions for preliminary injunctions and hearing on demurrer to indictment.

HAZEL, *District Judge:*

Indictments have been returned at this term of court against the above named complainants, alleging violations of section 2 of the Lever Act as amended October 22, 1919, and separate suits in
52 equity were thereafter brought by certain of the defendants to enjoin the United States Attorney from proceeding in the criminal actions pending final hearing. A rule to show cause was granted, which has now been heard, the Government appearing and contending for a dismissal of the bill, and opposing any stay.

In United States v. Reliable Credit Clothing Company, Inc., the defendant has demurred to the indictment. These four cases, involving substantially the same questions as to the validity of the indictment, have been heard together, and a simple opinion covering them will suffice.

Section 2 of the Lever Act, which is an amendment of section 4 of the original Act of August 10, 1917, makes it lawful for "any person wilfully—to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", and the contention of the defendants, who are dealers in wearing apparel, is in the main, that this provision of the Act is unconstitutional; that it takes property for public use without just compensation, in violation of the Fifth Amendment of the Constitution of the United States; that the indictment is vague and indefinite, and accordingly repugnant to the Sixth Amendment, and finally, that the President has not fixed a standard of prices to be charged for the articles. These objections are of vital importance.

When the original bill was debated in Congress it was designated as an "Emergency War Measure", and inasmuch as it has been decided in Hamilton v. Kentucky Distilling Co., 251 U. S., 160, that the war must technically be regarded as continuing until demobilization is complete, and until the President has proclaimed an end of the war, the power of Congress to prevent by appropriate legislation the evils of greed and profiteering, specified in the
53 indictment must be upheld.

It is a general rule that every statute is presumed to have been passed under the sanction of constitutional authority, and its unconstitutionality should not be declared unless it is clearly so. If there is doubt in the mind of the Court, the expressed will of the legislature should be sustained. From my examination of the decisions to which attention was drawn in argument, I conclude that the provision in question was a constitutional enactment, and was, and is a valid exercise of legislative power. It is not repugnant to the Fifth Amendment since, in my opinion, it imposes no greater limitations than does the Fourteenth Amendment upon state power. Hence, it follows that if a state has the legal right to impose restrictions upon dealers in necessaries, under the police power, then concededly, a like restriction may be enacted by the national Congress during time of war. Defendants earnestly contend that the states cannot regulate prices of necessaries, under the Fourteenth Amendment, in times of peace or in times of war or public peril, and indeed there are decisions, Milligan Ex Parte, 4 Wallace 2, and U. S. v. Freight Association, 166 U. S. 319, for example, wherein language is used apparently upholding this view. But, conceding that Congress is "subject to applicable constitutional limitations," it has nevertheless been decided by the Supreme Court, in Munn v. Illinois, 94 U. S. 113, that a state has power to regulate the conduct of its citizens toward each other, and, whenever necessary for the public welfare, it may determine how property in which the public has an interest, may be used. It is true the Supreme Court dealt, in the

54 Munn case, with a warehouse used for storing grain regarding which the General Assembly of Illinois had enacted a statute providing, among other things, for elevating rates and charges. It was asserted that the statute was void under the Fourteenth Amendment of the national Constitution but the Supreme Court affirmed the constitutionality of the Act passed by the State Assembly, and it was firmly held that whenever the owner of property devotes the same to a use in which the public is interested, he practically grants to the public an interest in such use, and to the extent of that interest, he must submit to be controlled by the public for the common good, as long as he maintains the use. The learned Court pointed out that it has always been customary "To regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

In Budd v. N. Y., 143 U. S. 550, the Supreme Court strictly adhered to the doctrine enunciated in the Munn case, and the warehousing was regarded as devoting private property to a public use in the same sense, the learned Court said, as did a common carrier, miller, ferryman, inkeeper, wharfinger, baker, cartman, or hackney coachmen. In Dueber Watch-Case Manufacturing Co. v. E. Howard Watch & Clock Co., 66 Fed. 637, Judge Lacombe referred to the Munn case saying:

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is 'devoted to a use in which the public has an interest'; and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity."

55 It cannot be doubted that food, and wearing apparel are properly defined as necessaries in which the public has an interest. Indeed, such I think was the view of Congress in the use of the word "necessaries". The Lever Act does not deprive anyone of his property without due process of law, it merely limiting the rate or charge for dealing in or with any necessaries. For the foregoing reasons I am of the opinion that this Court ought not to declare unconstitutional the provision to which exception is taken by defendants.

A more serious question, to my mind, is presented by the objection that the provision is void for uncertainty. Its indefiniteness was recognized in the debate of the Senate, and Senator Hoke Smith directed attention to Tozer v. U. S. 52 Fed. 917, a case much relied upon by the defendants, wherein Justice Brewer, then Circuit Judge, broadly held that under the undue preference clause of the Interstate Commerce Act, a conviction for its violation could not be sustained for the criminality of the act was made to depend upon

whether the jury thought a preference reasonable or unreasonable. The enactment in its present form nevertheless was passed by Congress, and presumably Congress intentionally used the words "Unjust or unreasonable rate or charge" without qualification or the inclusion of a maximum price or standard, to the end that there be a determination by the jury as to whether a rate or charge exacted for a necessary was unjust or unreasonable, in view of existing economic conditions. In determining such question it is essential to consider all the facts and circumstances, whatever they may
56 be, relating to the exacted rate or charge. There is merit in this contention by the Government. In Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, the Supreme Court had before it the Anti-Trust Statute of Texas, which included the words "Reasonably calculated to fix and regulate prices", and the Court said the phrase "reasonably calculated" merely implied the commission of an act which tended to accomplish the prohibited thing. It was there urged that the statute was void for uncertainty, but the Court was of opinion that the broad power was not given by the statute to a jury "to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable." The decision, true enough, left it doubtful as to the right of a jury in a criminal case to determine the reasonableness of a charge or rate, but in Nash v. U. S. 229 U. S. 373, which was a criminal case, this doubt was seemingly quieted. It was urged in that case that the statute was vague and indefinite, but Mr. Justice Holmes said:

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. * * * A criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct, 1 East P. S. 262."

Defendants contend, however, that this decision was based on the authority of the Water-Pierce Oil Co. case, and that it has no application to determination by a jury as to the unreasonableness of a rate or charge for a commodity since the provision under consideration has no standard or guide for a merchant making a charge or rate, and his criminality ought not to depend upon a mere belief of the jury. It is pointed out that in the Standard Oil cases and the Tobacco cases, 221 U. S. 1—106, the Supreme Court held that there must be a standard involved in the law to determine violations of the Anti-Trust Act, and that in such cases the rule of reason
57 fixed by the common law was applied as a standard. In the Nash case, however, consideration was given to this question as the excerpt quoted above would seem to show. In International Harvester Co. v. Kentucky, 234 U. S. 216, the Supreme Court reversed the State Court because the state statute offered no standard of conduct by which it was possible to understand in advance whether the price restriction in that case was violated or not. This decision was deemed consistent with the Nash case because, as stated

in the opinion, the Court dealt "with the actual, not with an imaginary condition other than the facts." It is certainly a pertinent inquiry as to whether the case at bar falls within the category of the Nash or International Harvester cases. I think the weight of authority justified me in holding that it comes within the former for the reason that in a later case, Miller v. Strahl, 239 U. S. 426, the Supreme Court expressed the view that rules of conduct must necessarily be expressed in general terms, and depend upon varying circumstances. The case concerned a police statute in which keepers of hotels were required to give notice to guests in case of fire, and it was held that such a statute was not void for uncertainty in not describing rules of conduct. See also Fox v. Washington, 236 U. S. 277; Omaechvarria v. Idaho, 246 U. S. 349; Sears Robuck & Co. v. Federal Trade Commission, 258 Fed. 307, as bearing upon the asserted indefiniteness of the Act. Candor compels the admission that the objection of uncertainty is not altogether free from doubt, and I am in agreement with Judge Rudkin in U. S. v. Spokane Dry Goods Co., et al. (opinion unreported) wherein, in overruling a demurrer to a similar indictment, he said:

"The situation confronting Congress was a difficult one at best. * * * To fix profits definitely and arbitrarily without reference to place or circumstance would prove unjust and oppressive in the extreme, for it is a matter of common knowledge that what
58 would be deemed just and reasonable in one place or as to one commodity, would be unjust or unreasonable in another place or as to a different commodity. Congress was therefore compelled to choose between the course pursued and some other course equally difficult, and the wisdom of its choice cannot be made the subject of judicial inquiry."

It is therefore held that the indictments are not invalid for uncertainty.

It is next objected that the indictment is void because the President has power to determine prices of necessaries, and omitted to do so; that it was a prerequisite to the violation of the Act that he should specify a fair price for wearing apparel. But section 1, which authorizes the President to make regulations and to issue "such orders as are essential effectively to carry out the provisions of this Act" does not, in my opinion, require that he fix the prices of wearing apparel or necessaries. By specific reference, the President was empowered, in other sections of the Lever Act, to fix the price of wheat, coal and coke, but not that of wearing apparel or food, and his failure to do so, perhaps because of its recognized futility, does not render the indictment invalid. The demurrer of the Reliable Credit Clothing Company, Inc., to the indictment is overruled.

In Hoffman Brewing Company v. McElligott, 259 Fed. 321, on appeal, 259 Fed. 525, it was substantially held that an injunction can only be granted in a case against a District Attorney to restrain the enforcement of a federal statute where it is unconstitutional. He may then be enjoined on the theory that the statute is nonexistent, and he acts without official authority. Since it is decided herein

that the statute is constitutional and valid it follows that the motions for interlocutory injunctions must be denied. The complainants, however, anticipating this decision, have expressed
59 a desire to have the conclusions reached herein reviewed, and their right to a temporary injunction determined by the Circuit Court of Appeals. This Court is quite willing that such a hearing be expedited, and, the Government consenting, that the status quo be maintained until it can be ascertained whether the Circuit Court of Appeals, because of the importance of the case, will assign an early date for hearing. Orders may accordingly be entered in conformity with the views expressed herein.

Dated April 30, 1920.

JOHN R. HAZEL, *D. J.*

60 *Stipulation as to Record.*

In the District Court of the United States for the Western District of New York.

In Equity. No. 285.

C. A. WEED AND COMPANY, Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York, Defendant-Appellee.

It is hereby stipulated by and between the solicitors and counsel for the respective parties to the above suit, that the above and foregoing is a true and complete transcript of the record on appeal from the final decree dismissing the bill of complaint and said suit, made and entered herein on the 11th day of June, 1920, as agreed upon between the parties hereto.

Dated Buffalo, N. Y., June 11, 1920.

SIMON FLEISCHMANN AND
EDWARD L. JELLINEK,
MARTIN CLARK,
Solicitors and Counsel for Plaintiff-Appellant.

STEPHEN T. LOCKWOOD,
United States Attorney and Solicitor for Defendant-Appellee.

61 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Harris S. Williams, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing and annexed printed copy has been pre-

sented to me with a stipulation by the attorneys of the parties that such printed copy is a true transcript of the record on appeal to the Supreme Court of the United States, from a decree of the United States District Court for the Western District of New York, in the suit in said District Court entitled C. A. Weed and Company vs. Stephen T. Lockwood as United States Attorney for the Western District of New York, as agreed on by the parties and I do certify the same to be the transcript of record on said appeal.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 11th day of June, A. D. 1920.

[Seal of the United States District Court.]

HARRIS S. WILLIAMS,
Clerk.

62 [Endorsed:] United States District Court, Western District of New York. C. A. Weed & Company, Plaintiff, against Stephen T. Lockwood, as United States Attorney for the Western District of New York. Copy. Stipulation and Certification of Record. Edward L. Jeltinek and Simon Fleischmann, Martin Clark, Attorneys for Plaintiff-Appellant, Office and P. O. Address, 932 Prudential Bldg., Buffalo, N. Y.

Endorsed on cover: File No. 27764. W. New York, D. C. U. S. Term No. 407. C. A. Weed & Company, appellant, vs. Stephen T. Lockwood, as United States attorney for the western district of New York. Filed June 16th, 1920. File No. 27764.